STATE OF MICHIGAN

COURT OF APPEALS

SCOTT BURMAN and KENDALL BURMAN,

Plaintiffs-Appellants,

v

CITY OF BIRMINGHAM and BIRMINGHAM BOARD OF ZONING APPEALS,

Defendants-Appellees.

UNPUBLISHED
November 25, 2003

No. 241981
Oakland Circuit Court
LC No. 01-034414-CZ

Before: Whitbeck, C.J., and Zahra and Donofrio, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's order granting summary disposition to defendants. We affirm.

I. Facts and Procedure

In February 2000, plaintiffs purchased the real property located at 492 Hanna in Birmingham, Michigan. The property contained a single-family house. Plaintiffs planned to demolish the existing house and build a 34.45-foot-tall French Tudor in its place.

In April 2000, the City of Birmingham Planning Board (the Planning Board) decided to propose to the City Commission an amendment to City of Birmingham Ordinance § 126-446 that would impose a thirty-five-foot height limit on single family residential houses. At a hearing to determine whether to adopt the Planning Board's recommendations, the City Commission voted to amend ordinance § 126-446 to impose a thirty-foot, rather than a thirty-five-foot, height restriction on single family residential houses.

Following the amendment of zoning ordinance § 126-446, plaintiffs filed an application for a variance from the height restriction in the ordinance. Plaintiffs requested a 4.5 foot variance from the thirty-foot height restriction, so they could build a 34.45-foot-tall house. At the public hearing before the Board of Zoning Appeals (BZA), plaintiffs' architect argued that the two adjacent houses were over thirty feet in height (they were built before the zoning ordinance was amended) and that plaintiffs' light and air would be blocked if they did not receive a variance. Plaintiffs' architect also argued that the proposed house had a French Tudor style, and the height was necessary to preserve the character of the neighborhood. The BZA voted to deny plaintiffs' request for a variance, finding that plaintiffs' need for the variance was

self-created and plaintiffs had not shown an undue hardship or practical difficulty in building a house within the limits of the zoning ordinance. The BZA noted that strict compliance with the ordinance would not prevent plaintiffs from building an attractive house.

Plaintiffs filed a lawsuit against the city of Birmingham and the city of Birmingham BZA, alleging, among other things, that city zoning ordinance § 126-446 was unconstitutional as violative of due process. The trial court denied plaintiffs' subsequent motion for summary disposition, and instead granted summary disposition to defendants on this issue.[1] The trial court determined that plaintiffs had failed to demonstrate a practical difficulty by failing to show that: (1) compliance with the ordinance would unreasonably prevent them from using the property, (2) the variance would do substantial justice to plaintiffs and other neighboring property owners, (3) the plight of plaintiffs was due to the unique circumstances of the property, and (4) the problem was not self-created. The trial court determined that plaintiffs were not denied substantive due process because they are not challenging the ordinance on its face, but are challenging the ordinance as applied to their property.

II. Analysis

A. Standard of Review

The trial court granted summary disposition to defendants under MCR 2.116(I)(2). "'The trial court properly grants summary disposition to the opposing party under MCR 2.116(I)(2) if the court determines that the opposing party, rather than the moving party, is entitled to judgment as a matter of law.' " *Detroit Free Press, Inc v City of Warren*, 250 Mich App 164, 166; 645 NW2d 71 (2002), quoting *Washburn v Michailoff*, 240 Mich App 669, 672; 613 NW2d 405 (2000). We review de novo a trial court's decision to grant summary disposition. *Id*. We also review de novo a trial court's ruling on a constitutional challenge to a zoning ordinance. *Scots Ventures, Inc v Hayes Twp*, 212 Mich App 530, 532; 537 NW2d 610 (1995).

B. Constitutionality of the Zoning Ordinance Height Limitation

Plaintiffs argue that the city of Birmingham ordinance § 126-446, imposing a thirty-foot height restriction on new single family residential houses, is invalid as a violation of substantive due process. We disagree. The state and federal constitutions guarantee that no person shall be deprived of life, liberty, or property without due process of law. US Const, Am XIV; Const 1963, art 1, § 17; *Landon Holdings, Inc v Grattan Twp*, 257 Mich App 154, 173; 667 NW2d 93 (2003). Substantive due process requires that zoning ordinances, like all police power legislation, must be reasonably exercised. *Delta Charter Twp v Dinolfo*, 419 Mich 253, 270; 351 NW2d 831 (1984). "A statute or ordinance may not be held invalid unless the objections urged

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[1] The trial court also granted summary disposition to defendants regarding plaintiffs' claim that the BZA's decision to deny plaintiffs' variance application was not supported by competent, material, and substantial evidence on the record. The trial court did not grant summary disposition to defendants regarding plaintiff's claim that the ordinance amounted to a regulatory taking. However, plaintiffs later dismissed this claim by stipulation.

on constitutional grounds appear on the face of the measure in question, or are established by competent proof." *Hitchman v Oakland Twp*, 329 Mich 331, 335; 45 NW2d 306 (1951). In order to afford substantive due process, an ordinance need only be rationally related to a legitimate government interest. *Landon Holdings, Inc, supra* at 173. A zoning ordinance that does not advance a legitimate governmental interest violates substantive due process and is invalid. *Hecht v Nile Twp*, 173 Mich App 453, 461; 434 NW2d 156 (1988). A legitimate governmental interest is grounded in the police power, and has been defined as including "'protection of the safety, health, morals, prosperity, comfort, convenience and welfare of the public, or any substantial part of the public.' " *Hecht, supra* at 460, quoting *Cady v Detroit*, 289 Mich 499, 504-505; 286 NW 805 (1939).

A zoning ordinance also violates due process if it is an unreasonable means of advancing a legitimate governmental interest. *Id.* at 461 Thus, an ordinance may not unreasonably, arbitrarily, or capriciously exclude other types of legitimate land use from the area in question. *Kropf v City of Sterling Heights*, 391 Mich 139, 158; 215 NW2d 179 (1974). In *Goolsby v Detroit*, 419 Mich 651, 678; 358 NW2d 856 (1984), the Supreme Court set forth the definitions of "arbitrary" and "capricious":

> "Arbitrary is: " '[Without] adequate determining principle . . . Fixed or arrived at through an exercise of will or by caprice, without consideration or adjustment with reference to principles, circumstances, or significance, . . . decisive but unreasoned.' "
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> "Capricious is: " '[Apt] to change suddenly; freakish; [or] whimsical. . . .' " [*Id*., quoting *United States v Carmack*, 329 US 230, 243; 67 S Ct 252; 91 L Ed 209 (1946), and *Bundo v City of Walled Lake*, 395 Mich 679, 703, n 17; 238 NW2d 154 (1976).]

In order for a court to find that an ordinance violates substantive due process, " '[i]t must appear that the clause attacked is an arbitrary fiat, a whimsical *ipse dixit*, and that there is no room for a legitimate difference of opinion concerning its reasonableness.' " *Kropf, supra* at 162, quoting *Brae Burn, Inc v City of Bloomfield Hills*, 350 Mich 425, 432; 86 NW2d 166 (1957).

A zoning ordinance is presumed to be valid and the party challenging the ordinance has the burden of showing that it has no real or substantial relation to public health, morals, safety, or general welfare. *Bevan v Brandon Twp*, 438 Mich 385, 398; 475 NW2d 37 (1991), amended 439 Mich 1202 (1991).[2] Although courts have the power to determine the validity of statutes and ordinances, they may not legislate or compel legislative bodies to legislate one way or another. *Kropf, supra* at 162. The judiciary may not question the legislature's good faith in acting for the public welfare. *Id.*

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[2] Plaintiffs argued at oral argument that defendants have the burden of proving that the height restriction has a substantial relation to public health, morals, safety, or general welfare. However, as discussed, it is plaintiffs who carry the burden of showing that the ordinance is *not* rationally related to a legitimate government interest. *Bevan, supra* at 398.

Plaintiffs argue that the city of Birmingham's zoning ordinance bears no rational relationship to the health, safety, and welfare of the residents of the city and is in direct contradiction to the recommendations made by the city staff and Planning Board. Plaintiffs contend that their complaint challenges the ordinance on its face, rather than as applied to their property. Although the trial court addressed plaintiffs' complaint as a challenge to the application of the ordinance to their property, as opposed to a facial challenge to the ordinance, we will address this issue because it addresses a question of law and all of the necessary facts are present. *Frericks v Highland Twp*, 228 Mich App 575, 593; 579 NW2d 441 (1998). "Facial challenges attack the very existence or enactment of an ordinance." *Id.*

In support of their argument, plaintiffs point to the Planning Board's recommendation to amend the zoning ordinance to impose a thirty-five-foot height limit, and the affidavit of one of the members of the Planning Board, stating that there was no reason for the height restriction in the ordinance to be thirty feet, rather than thirty-five feet. However, there was some disagreement at the April 12, 2000, Planning Board meeting regarding what the height limit should be on single-family residential houses. The record shows that some residents at the Planning Board meeting supported the thirty-foot height restriction, arguing that it would preserve the character of the neighborhood. Notwithstanding these arguments, the Planning Board in a non-unanimous vote recommended amending the zoning ordinance to incorporate the thirty-five foot restriction. The City Commission considered the Planning Board's recommendation at a meeting at which it heard from the City Planner and took comments from no less than forty-five people regarding the zoning ordinance amendment. After considering the arguments and comments, the City Commission decided to reject the Planning Board's recommendation and adopt an ordinance that included a thirty-foot height restriction.

Plaintiffs have not shown that there is no room for a legitimate difference of opinion concerning the reasonableness of the thirty-foot height restriction. See *Kropf*, *supra* at 162. The Michigan Legislature has specifically stated that cities have the authority to limit the height of buildings: the City, Village, and Municipal Planning Act provides, "To further carry out the objectives of this act, the legislative body of a city or village may regulate and limit the height and bulk of buildings erected . . . ." MCL 125.582. Furthermore, this Court has held that, "The concept of building height restrictions is virtually universally accepted as bearing a substantial relation to public health, safety, morals and welfare." *Sisters of Bon Secours Hosp v City of Grosse Pointe*, 8 Mich App 342, 360-361; 154 NW2d 644 (1967), citing *Village of Euclid v Ambler Realty Co*, 272 US 365; 47 S Ct 114; 71 L Ed 303 (1926). This Court has upheld zoning ordinances limiting the height of buildings in *Sisters of Bon Secours Hosp*, *supra* at 360-361, and *Rodney Lockwood & Co v City of Southfield*, 93 Mich App 206, 214-215 (1979). We must presume the ordinance is valid absent evidence to the contrary. *Bevan*, *supra* at 398. Here, plaintiffs have not met their burden of showing that the thirty-foot height restriction is an unreasonable limitation on Birmingham residents' use of their property. Residents may still build attractive, functional houses that comply with the strict letter of the ordinance. Therefore,

we conclude that plaintiffs have not shown that the city of Birmingham ordinance § 126-446, imposing a thirty-foot height restriction on new single family residential houses, is invalid on its face as a violation of substantive due process.

Affirmed.

/s/ William C. Whitbeck
/s/ Brian K. Zahra
/s/ Pat M. Donofrio